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No. 77-1816

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK DI GILIO and EUGENE SANGILLO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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OPINION BELOW

The judgment order of the court of appeals (App. A, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1978. The petition for a writ of certiorari was filed on May 30, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a speedy trial.

2. Whether petitioner Di Gilio's trial was barred by the Double Jeopardy Clause.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiring to forge endorsements on United States Savings Bonds, in violation of 18 U.S.C. 371, and of forging and uttering forged United States Savings Bonds, in violation of 18 U.S.C. 495 and 2. Petitioners were sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed (App. A, *infra*).

In 1968, twenty-five $1000 United States Savings Bonds were stolen from Margret Sharp in Chester, New Jersey. Thereafter, one Fred Wankmuller asked petitioner Di Gilio for help in marketing the bonds. Di Gilio then spoke with petitioner Sangillo about the scheme. After further discussion with Wankmuller, petitioners agreed to sell the bonds (C.A. App. 32b), and Wankmuller gave the bonds to Di Gilio (C.A. App. 36b).[1]

[1] "C.A. App. a" refers to the appendix filed by petitioners in the court of appeals. "C.A. App. b" refers to the supplemental appendix filed by the government in the court of appeals.

About a week later, petitioners and Wankmuller met with Herbert Gross and co-defendant Nicholas Valvano. Gross and Valvano said they might be able to sell the bonds (C.A. App. 39b-44b, 81b), but they were unsure how much money they could get for them (C.A. App. 46b). Petitioners nevertheless agreed to transfer the bonds with the understanding that they would be paid later. Valvano, Gross, and co-defendants Craporatta and Greaves later cashed the bonds at their full face value, but petitioners were unsuccessful in their attempts to obtain any of the cash proceeds from the stolen bonds (C.A. App. 59b-61b, 63b, 113b-114b, 115b).[2]

ARGUMENT

1. Petitioners contend (Pet. 7-15) that the three-year delay between their indictment in July 1973 and their jury trial in July 1976 deprived them of their Sixth Amendment right to a speedy trial.

As this Court held in *Barker* v. *Wingo*, 407 U.S. 514, 530-533, the question whether a delay in bringing a defendant to trial violates the Sixth Amendment depends on the length of the delay, the reasons for it, the extent of prejudice caused by the delay, and whether the defendant has asserted his right to a speedy trial. Judged by these standards, the delay

[2] Valvano pleaded guilty to one count of conspiracy in September 1974. Herbert Gross was named in the indictment as an unindicted co-conspirator.

in this case did not violate petitioners' Sixth Amendment rights.

The 14-month delay between the indictment and the original trial date in September 1974 was attributable for the most part to the pretrial motions filed on behalf of petitioners and their co-defendants, including a motion to remove travel restrictions, a motion for discovery and inspection, a motion by petitioner Di Gilio for a severance, and motions by both petitioners for dismissal of the indictment. During this period, petitioners made no request to expedite their trial (C.A. App. 2a-5a).

On the eve of trial, which had been scheduled for September 1974, the chief government witness, Fred Wankmuller, disappeared (C.A. App. 6b-8b); he was not apprehended until September 1975 (C.A. App. 36a).[3] The absence of the principal witness for the government is a valid reason to justify delay in the commencement of trial. *Barker* v. *Wingo*, *supra*, 407 U.S. at 531; *United States* v. *Lawson*, 545 F.2d 557, 560 (C.A. 7); see also 18 U.S.C. 3161(h)(3)(A). The remaining delay of 10 months before petitioners' trial in July 1976 was caused in part by hearings on additional motions made by the defense,

[3] Following the disappearance of this witness, the government successfully moved to sever petitioner Di Gilio from the trial of co-defendants Celso and Craporatta (C.A. App. 23a-26a). That trial ended in a mistrial on September 27, 1974. The indictment was dismissed against Craporatta on October 15, 1975 (C.A. App. 6a). Celso was tried with petitioners and convicted.

including a second motion by petitioner Di Gilio to dismiss the indictment (C.A. App. 6a-8a).

In addition, petitioners did not press throughout the pre-trial period for an early trial. Petitioner Sangillo did not raise the claim at all before trial, and petitioner Di Gilio raised the claim only when the principal government witness disappeared. At that time, petitioner Di Gilio requested that trial be held on the originally scheduled trial date in September 1974, but he did not raise the speedy trial issue again until December 22, 1975, when he moved for dismissal of the indictment on speedy trial grounds (C.A. App. 28a-29a).[4] Finally, petitioners, who were not in custody during the period of delay, have neither claimed nor demonstrated that the delay in any way prejudiced their defense.[5] Under these circumstances, petitioners have failed to show a constitutional violation under the *Barker* v. *Wingo* standards.

2. Petitioner Di Gilio contends (Pet. 15-21) that his conviction violated the Double Jeopardy Clause because in September 1974, after a jury was selected but before it was sworn, the district court granted the government's motion to sever him from his co-

[4] Petitioners contend that they made a request for a speedy trial "by mail" in September 1975 (Pet. 9). We have not found any reference to this demand in the record.

[5] Petitioners note (Pet. 11) that "prejudice may be manifested in terms of faded memories, lost evidence or increased anxiety," but make no claim that *their* defense was adversely affected by any of those possibilities. Rather, they argue that, in this case, the "factor of prejudice should not even be considered" (*ibid.*).

defendants. Although Di Gilio was not tried at that time, he contends that he was placed in jeopardy then and that the 1976 trial therefore impermissibly placed him in jeopardy for a second time. This contention has no merit.

Petitioner Di Gilio was not subjected to a second jeopardy because he was not in jeopardy at the first trial. In *Crist* v. *Bretz*, No. 76-1200, decided June 14, 1978, this Court reaffirmed the rule that jeopardy attaches when the jury is sworn (slip op. 8), noting that the rule "is not only a settled part of federal constitutional law [but] a rule that both reflects and protects the defendant's interest in retaining a chosen jury" (*id.* at 10). Di Gilio urges that he was exposed to practically the same hardships that he would have experienced had the jury been sworn while he was still joined with the other defendants. But this Court rejected a similar argument in *Serfass* v. *United States*, 420 U.S. 377, where the Court held that the Double Jeopardy Clause "does not come into play until a proceeding begins" before the trier of fact (*id.* at 391), and that the proceeding does not begin in a jury trial until "a jury is empanelled and sworn" (*id.* at 388).[6]

[6] In *Downum* v. *United States*, 372 U.S. 734, upon which Di Gilio relies, the jury was dismissed after jeopardy had attached because the government failed to subpoena a key witness and the witness consequently did not appear. In this case, by contrast, jeopardy had not attached; the witness (Wankmuller) had been subpoenaed (C.A. App. 6b-7b); and his failure to appear was not due to prosecutorial negligence but, apparently, to Wankmuller's fear that he would be murdered if he testified (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

WILLIAM G. OTIS,
JOHN VOORHEES,
Attorneys.

AUGUST 1978.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1389
77-1618

UNITED STATES OF AMERICA

vs.

NICHOLAS VALVANO; VINCENT J. CRAPORATTA; FRANK DI GILIO; EUGENE SANGILLO; JOSEPH CELSO, and LILLIAN GREAVES

EUGENE SANGILLO,

APPELLANT IN NO. 77-1389

UNITED STATES OF AMERICA

vs.

NICHOLAS VALVANO; VINCENT J. CRAPORATTA; FRANK DI GILIO; EUGENE SANGILLO; JOSEPH CELSO, and LILLIAN GREAVES

FRANK DiGILIO,

APPELLANT IN NO. 77-1618

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 472-73)

Argued April 25, 1978

Before: ALDISERT and ADAMS, *Circuit Judges*, and HANNUM, *District Judge**

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* Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

After considering the contentions raised by appellants, to-wit, that (1) appellants should be granted a judgment of acquittal based upon the deprivation of their Sixth Amendment rights in that they were not afforded a speedy trial; (2) the government failed to prove the conspiracy alleged in the indictment; (3) the conviction sub judice violates appellant DiGilio's rights pursuant to the Fifth Amendment barring double jeopardy; and (4) appellants were not aiders and abettors; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

/s/ Aldisert
Circuit Judge

DATED: April 25, 1978

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